

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

_____	)	
UNITED STATES	)	
	)	
v.	)	CRIMINAL ACTION NO. 03-10091-PBS
	)	
DANIEL H. GEORGE, JR.,	)	
Defendant.	)	
_____	)	

**ORDER**

April 6, 2004

Saris, U.S.D.J.

**INTRODUCTION**

The Defendant is charged with tax evasion under 26 U.S.C. § 7201 (Counts I-IV) and using a false social security number under 42 U.S.C. § 408(a)(7)(B) (Counts V-VIII). The Defendant moves to sever Counts I-IV from Counts V-VIII on the grounds that joinder under Fed. R. Crim. P. 8(a) is improper or, in the alternative, joinder would be unduly prejudicial under Fed. R. Crim. P. 14(a). After hearing, the motion is **DENIED** without prejudice.

**FACTUAL BACKGROUND**

The indictment alleges the following facts. The Defendant operated a business that manufactured, sold, and analyzed mineral and herb products. Between January 1, 1996 and December 31, 1999, he deposited \$460,000 in business receipts into bank accounts at various financial institutions in Massachusetts and

earned \$470,000 in interest income. Although the Defendant had taxable income of over \$800,000 during the four-year period, he did not file tax returns and paid no taxes.

The indictment alleges in Counts I-IV that the Defendant attempted to evade paying the tax by "engaging in affirmative acts of evasion to conceal and attempt to conceal" his income. To conceal his income, he deposited unreported business receipts into bank accounts that he opened with false social security numbers and earned interest income that he also did not report.

The indictment alleges in Counts V-VIII that the Defendant used the same false social security number to open four bank accounts at four different financial institutions. These accounts were opened between November 1998 and December 1999.

The Government made a proffer that the Defendant deposited the unreported business income charged in the indictment into five bank accounts that were opened with false social security numbers. The Defendant then transferred this money and unreported interest income into other accounts, which he also opened with false social security numbers. He opened a total of twelve accounts with false social security numbers during the relevant time period, using four different false social security numbers. Four of the bank accounts, which were opened with the same false social security number and which held unreported business and interest income upon which the Defendant sought to

evade paying taxes, form the basis for Counts V-VIII.

## **DISCUSSION**

### **I. Rule 8(a)**

Rule 8(a) of the Federal Rules of Criminal Procedure allows the joinder of offenses "if the offenses charged . . . are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan." This rule is "generously construed in favor of joinder," partly because of the further protection that Fed. R. Crim. P. 14 provides. United States v. Randazzo, 80 F.3d 623, 627 (1st Cir. 1996). "A defendant challenging . . . joinder must carry the devoir of persuading the trial court that a misjoinder has taken place." United States v. Natanel, 938 F.2d 302, 306 (1st Cir. 1991).

Joinder is proper under the "common scheme or plan" prong of 8(a) when "one illegal activity provides the impetus for the other illegal activity." United States v. Dominguez, 226 F.3d 1235, 1239 (11th Cir. 2000) (holding joinder of drug-related and mortgage fraud claims proper where government alleged that when applying for mortgage, defendant submitted fraudulent income tax returns to bank to conceal that his income had been derived from drug activity); United States v. Whitworth, 856 F.2d 1268, 1277 (9th Cir. 1988) (holding joinder of espionage and tax evasion charges was proper where money "received in exchange for

classified information was the same as that involved in the tax charges").

"In the ordinary case, a rational basis for joinder of multiple counts should be discernible from the face of the indictment." Natanel, 938 F.2d at 306-07 (holding that a continuing criminal enterprise charge brought against Natanel's co-defendant "provided the mucilage which glued the indictment together," so joinder was proper even though the tie would have been "more easily visualized" if the distribution of cocaine charge "had been listed in the indictment as a predicate for the CCE count"). Rule 8(a) does not require an "explicit cross-reference" between counts. Id. at 307.

Rule 8(a) does not create a rigorous standard for the prosecution to overcome. See Dominguez, 226 F.3d at 1240-41 (holding joinder proper where the government had sufficiently explained the basis for joinder in response to defendant's motion to sever, even assuming the allegations in the indictment were insufficient on their own to warrant joinder). Therefore, "[i]t is enough that when faced with a Rule 8 motion, the prosecutor proffers evidence which will show the connection between the charges." Id. at 1241.

## **B. Application**

In the present case, joinder of the tax fraud and false social security number counts is proper under the "common scheme

or plan” prong of 8(a) because one of the “illegal activit[ies] provide[d] the impetus for the other illegal activity.” See id. at 1239.

Paragraph 7 of the indictment alleges that the Defendant “took affirmative acts to conceal his income and evade the tax that was due and owing on it” by “deposit[ing] his unreported business receipts into bank accounts that he had opened with false social security numbers.” This paragraph is expressly incorporated into Counts I-IV and into Counts V-VIII. (Indict. ¶¶ 9, 11.) Although the connection could have been more transparent if the indictment expressly alleged that the bank accounts that form the basis for Counts V-VIII are some of the same accounts that the Defendant used to conceal his income and evade taxes, such an explicit cross-reference is not required. The face of the indictment makes it sufficiently apparent that the Government is alleging that the Defendant used a false social security number to open the accounts referenced in Counts V-VIII in order to conceal his income and evade taxes, for which he is charged in Counts I-IV. Any ambiguity was elucidated by the proffer. There is, thus, a rational basis for joinder on the face of the indictment and joinder under 8(a) is proper.

## **II. Rule 14(a)**

“If the joinder of offenses . . . in an indictment . . . appears to prejudice a defendant . . . the court may order

separate trials of counts . . . or provide any other relief that justice requires." Fed. R. Crim. P. 14(a). "Severance for undue prejudice is a matter committed to the sound discretion of the trial judge." United States v. Alosa, 14 F.3d 693, 694-95 (1st Cir. 1994). One type of undue prejudice that may be caused by trying a defendant for different offenses at the same trial is that "a defendant may wish to testify in his own behalf on one of the offenses but not another, forcing him to choose the unwanted alternative of testifying as to both or testifying as to neither." United States v. Scivola, 766 F.2d 37, 41-42 (1st Cir. 1985).

Severance is not automatic when a defendant wants to testify on some counts and not others, but, rather, the defendant must "make[] a convincing showing that he has both important testimony to give concerning one count and strong need to refrain from testifying on the other'" in order for severance to be warranted. United States v. Jordan, 112 F.3d 14, 17 (1st Cir. 1997) (quoting Alosa, 14 F.3d at 695). A defendant "must timely offer enough information to the court to allow it to weigh the needs of judicial economy versus 'the defendant's freedom to choose whether to testify' as to a particular charge" in order to make this showing. Id. (quoting Scivola, 766 F.2d at 43).

The Defendant has made a proffer asserting that he desires to testify as to Counts V-VIII, but not as to Counts I-IV.

Counts V-VIII require the Government to show that the Defendant used a false social security number with an intent to deceive, and the testimony that the Defendant would likely provide as to Counts V-VIII is that his use of a false security number was due to mistake or negligence. The Defendant further asserts that he has a strong need to remain silent on Counts I-IV "because of the risks of exposing himself to wide-ranging cross-examination on a much more complex subject matter." (Def.'s Mot. at 9.) As an example, the Defendant alludes to the difficulty and embarrassment that he would experience when confronted on cross-examination with statements that he made to undercover DEA agents.

Where the defendant seeks to give testimony that is analogous to a "credible alibi that only the defendant can supply showing him to have been elsewhere at the time of the crime," such testimony is generally deemed "important." See Jordan, 112 F.3d at 17. The availability of alternative forms of evidence does not generally make the testimony any less "important." See id. (holding defendant's subjective belief that income was not taxable was not adequately before the jury by the introduction of defendant's statement on his tax form that income was not taxable); see also United States v. Best, 235 F. Supp. 2d 923, 929 (N.D. Ind. 2002) (holding that although there were other forms of evidence available to establish alibi, "defendant's

testimony in his own trial is unique and inherently significant").

The Defendant's proffer is inadequate to demonstrate undue prejudice in that he has not made a convincing showing that he has important testimony to give on the Counts V-VIII and a strong need to refrain from testifying with respect to the other counts. However, the Defendant may make a detailed *in camera* proffer and renew this motion prior to trial. If the Court is satisfied that the Defendant has demonstrated prejudice, it will sever the two sets of counts.

**ORDER**

The motion to sever is **DENIED** without prejudice.

**S/PATTI B. SARIS**  
United States District Judge